87-584

No.

Supreme Court, U.S.
FILED
OCT 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

October Term, 1987

Donald Webb ..... *Petitioner*

VS.

State of Arkansas ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS COURT OF APPEALS

JOHN R. HENRY
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404 Market Street
Harrisburg, Arkansas 72432

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the practice of allowing Sheriff's Department personnel to serve as bailiff and custodian of the jury at a trial where another member of that department gives testimony in the case infringes upon the right to a jury trial by a panel of impartial jurors.

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No.

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Donald Webb ..... *Petitioner*

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State of Arkansas ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

The Petitioner, Donald Webb, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Arkansas Court of Appeals entered in the above entitled case on July 8, 1987.

OPINION BELOW

The opinion of the Arkansas Court of Appeals is not reported and is designated as an opinion not for publication. This opinion appears in Appendix "A" to this petition.

JURISDICTION

The opinion of the Arkansas Court of Appeals was rendered June 10, 1987. That Court entered final judgment upon denying rehearing July 8, 1987, a copy of which appears in Appendix "B". The jurisdiction of the United States is involved under 28 U.S.C. 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, FIFTH AMENDMENT:

> No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

CONSTITUTION OF THE UNITED STATES, SIXTH AMENDMENT:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, * * * and to have the assistance of counsel for the defense.

CONSTITUTION OF THE UNITED STATES, FOURTEENTH AMENDMENT:

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT OF THE CASE

Donald Webb was charged with the charge of theft by receiving. At a jury trial, Sheriff Coolidge Conley was Court bailiff and custodian of the jury. Chief Sheriff's Deputy Sam Hughes, was a principal witness for the State. (R. 50-52) Petitioner objected to this practice.

The jury returned a verdict of guilty against petitioner and sentenced him to a term of eight years imprisonment.

REASON FOR GRANTING THE WRIT

The sanctioned State practice of allowing County Sheriff personnel to serve as bailiff and custodian of the jury at a trial where another member of that department gives testimony in the case infringed upon petitioner's right to a trial by a fair and impartial jury.

Petitioner respectfully contends that his right to a jury trial by an impartial jury was compromised in this cause when the sheriff served in the position of bailiff and custodian of the jury, and another member of his department, Chief Deputy Sam Hughes, gave material testimony in the case. (R. 127) Here additionally the sheriff collaborated with the prosecution in the jury selection phase of the proceeding.

Petitioner would submit that the state practice condoning such a practice is patently unfair.

The courts of Arkansas follow the rule set out in *Hendrix v. State*, 200 Ark. 973, 141 S.W.2d 852 (1940) and reaffirmed in this case, that the complained of proceeding is proper and may be the basis for reversal only if resulting prejudice can be shown.

Petitioner would respectfully submit that the complained of practice is per se prejudicial and affronts the court's ruling in *Turner v. State of Louisiana*, 379 U.S. 466, 13 L.Ed.2d 424, 85 S.Ct. 546. In *Turner* the Court, in reversing the decision, stated:

> "For the relationship was one which could not but foster the jurors' confidence in those who were their official guardians during the entire period of the trial."

Such a practice, as questioned herein, should not be allowed to continue. Basic fairness would require that the bailiff and custodian of the jury be one other than a member

of the police agency whose members are witnesses in the case. Not only must the procedure be fair, it must appear fair.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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404 Market Street
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Counsel for Petitioner

APPENDIX "A"

DIVISION I

ARKANSAS COURT OF APPEALS

No. CACR 86-227

Opinion Delivered
June 10, 1987

DONALD WEBB,	AN APPEAL FROM THE ST. FRANCIS
APPELLANT	COUNTY CIRCUIT COURT
V.	HON. HARVEY YATES, JUDGE
STATE OF ARKANSAS,	
APPELLEE	AFFIRMED

GEORGE K. CRACRAFT, Judge

Donald Webb appeals from his conviction of theft by receiving of property valued in excess of $2500.00 for which he was sentenced to a term of eight years in the Arkansas Department of Correction. We find no error and affirm. As appellant does not question the sufficiency of the evidence to sustain his conviction, a recitation of all of the evidence would unduly lengthen this opinion. We therefore recite only those facts which are necessary to an understanding of our conclusions.

The State's witnesses testified that two youthful burglars entered a home and stole a quantity of jewelry of substantial value. They offered to sell two stolen rings to the appellant, who would not purchase them without first determining that they were of real gold. A local jeweler informed him that the rings were worth in excess of $2,000.00 each. The appellant

then purchased the two rings from the burglars for a total of $500.00.

During the selection of the jury, the appellant's attorney stated to the court that the prosecuting attorney was conferring with the sheriff about preemptory challenges of the first two jurors. He moved that, as the sheriff was to be the custodian of the jury, he should not assist in the selection of the jury and objected to his further assistance to the prosecutor. The court overruled the objection and the abstract reflects nothing further with regard to the actions of the sheriff during the jury selection.

Appellant argues that, because the sheriff assisted the prosecution in the selection of the jury and acted as bailiff and custodian of the jury, he was denied the right to a speedy and public trial by an impartial jury. We find no error in the court's ruling on that motion. Here, as in *Maxwell v. State*, 188 Ark. 111, 64 S.W.2d 79 (1933), the record fails to disclose any activity on the part of the sheriff or that his duties did not demand his presence. The court saw no objection to his prompting the prosecuting attorney regarding matters within his knowledge when called upon. *See Ridenour v. State*, 184 Ark. 475, 43 S.W.2d 60 (1931). The appellant cites a number of cases from foreign jurisdictions which hold that, even though there is no record of conversation between a sheriff-bailiff and the jurors, a sheriff who is a witness should not serve as a bailiff in charge of the jury. We are not persuaded by those cases because the sheriff did not testify in this case and because of the decision of our supreme court in *Hendrix v. State*, 200 Ark. 973, 141 S.W.2d 852 (1940), holding that it was not error to refuse to replace the sheriff as custodian of the jury where it was not shown that there was any communication between the sheriff and the jury relating to the trial or that the sheriff was otherwise guilty of misconduct. There is no evidence here of any improper communication by the sheriff to members of the jury or that he was guilty of any other misconduct. In order to warrant reversal one must show not

only that there was error but also that prejudice resulted. *Berna v. State*, 282 Ark. 563, 670 S.W.2d 434 (1984).

In his closing argument, the prosecuting attorney stated to the jury that justice in this country lies "in the jury box." He stated:

> If you don't find the truth you open the door in this community for all types of violence. . . . And you will not only say to this defendant, "we shall not tolerate that kind of conduct in this county." That verdict will say to all, "We will not tolerate these actions here. We will say 'no.' "

The appellant contends that the trial court erred in refusing his motion to prevent the prosecuting attorney from making that argument and in refusing to grant a new trial based on it. We find no error.

The trial judge is afforded a wide latitude of discretion in controlling the scope and propriety of arguments of counsel to the jury, the exercise of which will not be reversed in the absence of manifest abuse. We are unable to conclude that there was any such abuse of the court's discretion here. We agree with counsel that theft by receiving is not a crime of violence, but the mention of it was not so prejudicial as to warrant the relief requested. Furthermore, we do not find that the comment was raised as an issue before the trial court. The only objection raised in the trial court was with regard to the prosecuting attorney's statement that a guilty verdict would amount to a deterrent against this particular type of crime. Refusal to exclude expressions of the prosecuting attorney as to the effect of failure to properly enforce the law has been held not to be erroneous. *See Hill v. State*, 253 Ark. 512, 487 S.W.2d 624 (1972), and cases cited therein. In *Reynolds v. State*, 18 Ark. App. 193, 712 S.W.2d 329 (1986), this court specifically held that it was not error for the prosecuting attorney to make a plea to the jury to convict the appellant

on the evidence presented in order to deter others from engaging in the same conduct.

The appellant next contends that the trial court erred in not permitting him to present evidence of prior instances in which he had worked with the sheriff's office to recover stolen goods. He argues that, under Rules 404, 405, and 406 of the Arkansas Rules of Evidence, he should have been permitted to offer evidence of a "pertinent trait of helping the sheriff's office when, in the course of buying and selling goods, the appellant discovered stolen property." Those rules of evidence deal with evidence of character and traits of character, and how and by whom they may be proved. Here, the trial court was not informed that the appellant intended to present that evidence as proof of a character trait or habit. There is nothing in the record to indicate that the appellant intended to offer evidence of anything more than a single, isolated incident that occurred at sometime in the past. The only reference to this evidence in the record was contained in a discussion prior to trial in which the prosecuting attorney stated:

> Another thing your Honor, it is my information that Mr. Sharpe, by cross-examination, or in statement, or by direct proof, in an attempt to prove that the defendant *on some other occasion* other than the one we are talking about had in *some fashion* assisted the sheriff's office in recovering stolen goods. That, I think, is irrelevant and I would so move the court to grant a motion in limine. [Emphasis added.]

The appellant's attorney stated that he had told the prosecuting attorney two weeks earlier that he was going to call a deputy sheriff "to do that" and that "[i]f the court is going to grant the motion, we would ask for a continuance of the case." The trial court ruled that evidence of some prior isolated incident would be irrelevant and, as it was the type of objection that could have been made whenever the evidence was offered, that no continuance was warranted. We find no error.

It is clear that the trial court was never informed that the appellant intended to establish a character trait or habit based on continuous conduct. All the trial court knew from the prosecutor's statement was that "on some other occasion" and "in some fashion" he had aided the officers. As no proffer of proof was made as to what the excluded testimony would have been, it was not considered by the trial court and cannot be considered by us on appeal. Appellant contends that it should have been made known to the court by the context of the questions. Appellant did not ask a question but simply responded to a statement made by the prosecuting attorney with reference to one single incident. The appellant made no effort to correct that impression.

Furthermore, although A.R.E. Rule 404(a)(1) provides that an accused may offer evidence of a pertinent trait of his character for the purpose of proving that he acted in conformity with that trait on a particular occasion, Rule 405(a) requires that such proof be made by reputation or opinion evidence. Rule 405(b) permits proof by specific instances of conduct only when that trait relates to an essential element of the charge or defense. Rule 406(a) provides that evidence of habit or routine practice is relevant to prove the conduct of a person on a particular occasion was in conformity therewith, but Rule 406(b) requires that the proof be by either opinion or specific instances of conduct sufficient in number to warrant a finding that the habit existed or the practice was routine. Here, appellant did not attempt to prove character by reputation or opinion evidence. He sought to prove it by evidence of one specific instance which would not meet the requirements of Rule 405(b) or 406(b).

In the appellant's motion for new trial he alleged that the motion should be granted because of newly discovered evidence of conversations which occurred between sequestered witnesses in violation of A.R.E. Rule 615. The decision of whether to grant a new trial is left to the sound

discretion of the trial judge and his decision will not be reversed in the absence of an abuse of discretion or manifest prejudice to the complaining party. Newly discovered evidence is a least favored ground for new trial. *Vasquez v. State*, 287 Ark. 468, 701 S.W.2d 357 (1985). From our examination of the record, we find no abuse of discretion.

At the hearing on the motion, it was shown that the two young men who sold the stolen goods to appellant were sequestered at the beginning of the trial and admonished not to discuss their testimony. The first one, after being called as a witness, returned to the witness room and was asked by his companion, "What did you tell them?" He allegedly responded that he had testified that they (the two youths) had been "riding around smoking dope," saw a house, and decided to break into it. A deputy sheriff who was also a sequestered witness was said to have participated in that conversation.

The communication between these witnesses was not shown in any way to be related to the appellant's guilty knowledge that the property was stolen. The purpose of sequestering or excluding witnesses under this rule is to expose inconsistencies in their testimony and to prevent the possibility of one witness shaping his own testimony to match that given by another witness. *Fite v. Friends of Mayflower, Inc.*, 13 Ark. App. 213, 682 S.W.2d 457 (1985). The issue here was not the guilt or innocence of the two youths in breaking into the house or what they were doing when they decided to commit burglary. The issue in this case was whether appellant knew that the goods he purchased from the two thieves had been stolen. What they did before they sold the goods to appellant was irrelevant. It is not enough to show a violation of the rule or that an error occurred. It is no longer presumed that any error shown is prejudicial error. The burden rests with the party alleging error to show that he was prejudiced by it. *Berna v. State, supra.* The trial court found that no prejudice

resulted from the conversations. From our review of the record, we cannot conclude that in so doing the trial court abused its discretion or that manifest prejudice resulted.

Affirmed.

Corbin, C.J., and Cooper, J., agree.

APPENDIX "B"

Office of the Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Little Rock

July 8, 1987
(Filed Jul. 9, 1987)

Dona L. Williams
Clerk

Robin Henthorne
Chief Deputy

Leslie W. Steen
Chief Deputy

Jane Owen
Deputy

Melissa Fuller
Deputy

Denise Parks
Deputy

Kit Acklin
Deputy

Todd Griffin
Deputy

Rae A. Warren
Deputy

Greta Bivens
Deputy

Allen Waters
Deputy

Harold Sharpe
Attorney at Law
P.O. Box 924
Forrest City, AR 72335

RE: CACR86-227 Donald Webb v. State of Arkansas

Dear Mr. Sharpe:

The Arkansas Court of Appeals made the following order today in the above styled case:

"Petition for Rehearing is denied."

Sincerely yours,

/s/ Dona L. Williams, Clerk

DLW:mf

cc: Mary Beth Sudduth
W.C. "Bill" Gatling, Clerk
(Circuit Court No. CR85-275)

APPENDIX "C"

IN THE ARKANSAS COURT OF APPEALS

DONALD WEBB — APPELLANT

VS. — NO. CACR 86-227

STATE OF ARKANSAS — APPELLEE

NOTICE OF APPEAL
TO THE UNITED STATES SUPREME COURT

Comes now appellant, Donald Webb, and files his notice of appeal to the Supreme Court of the United States of the decision of this Court of June 10, 1987, affirming the decision of the circuit Court of St. Francis County, Arkansas, rendered on May 14, 1986.

WHEREFORE, appellant prays an appeal to the Supreme Court of the United States.

/s/ John R. Henry

John R. Henry
Henry & Mooney
404 Market Street
Harrisburg, Arkansas 72432

CERTIFICATE OF SERVICE

Comes John R. Henry, attorney for appellant, and certifies that he has served a copy of the notice of appeal to the United States Supreme Court upon the Hon. Steve Clark, Attorney General, Justice Building, Little Rock, Arkansas 72203 on this 17th day of July, 1987.

/s/ John R. Henry

John R. Henry

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987
No. _____

DONALD WEBB PETITIONER

VS.

STATE OF ARKANSAS RESPONDENT

PROOF OF SERVICE

I, John R. Henry, do hereby certify that I have mailed a copy of the Petition for Certiorari to be filed herein upon the counsel of record for Respondent, State of Arkansas, by sending a copy by first class mail, postage prepaid, to the Attorney General of Arkansas, Justice Building, Little Rock, Arkansas 72201 on this 5th day of October, 1987.

JOHN R. HENRY
HENRY & MOONEY
404 Market Street
Harrisburg, Arkansas 72432